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See Also

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Response

Pitfalls Along the Brave New Energy Federalism Path

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I. Introduction

In his *Texas Law Review* article, *The Brave New Path of Energy Federalism*, Professor Jim Rossi takes an insightful and comprehensive study of the federalism implications of three recent Supreme Court decisions.[1] After decades of judicial precedent interpreting the Federal Power Act and the Natural Gas Act as dividing energy authority between federal and state actors along bright lines, these opinions have breathed new life into a more case-by-case approach to energy federalism disputes. Professor Rossi has argued persuasively that recent Supreme Court jurisprudence has limited dual sovereignty's role as the organizing federalism principle under energy statutes.[2] Alternatively, Professor Rossi's novel approach argues for concurrent jurisdiction over energy. Instead of a default to preemption principles that further entrench the idea of separate spheres, Professor Rossi urges a pragmatic focus on the purposes behind each regulator's actions. While a move away from harsh preemption is tempting, this response illustrates a few obstacles associated with its implementation.

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1. Jim Rossi, *The Brave New Path of Energy Federalism*, 95 TEXAS L. REV. 400 (2016); ONEOK, Inc. v. Learjet, Inc., 135 S. Ct. 1591 (2015); FERC v. Electric Power Supply Ass'n, 136 S. Ct. 760 (2016); Hughes v. Talen Energy Marketing, LLC, 136 S. Ct. 1288, 1297 (2016).

2. Rossi, *supra* note 1, at 407, 429–443.

Professor Rossi begins by rightfully reminding us all of the impetus for these two New Deal energy statutes.[3] The impetus was to fill the *Attleboro* gap—the regulatory void where no one state was allowed to act.[4] The growing interstate nature of the electric grid was prompting the need to consider federal regulation to ensure there would not be a regulatory vacuum where no jurisdiction had authority.[5] Relying on its Commerce Clause authority, Congress in the 1930s provided for the first federal regulation of energy.[6] Professor Rossi then provides us with some flavor of the last eighty years of energy federalism jurisprudence, demonstrating why these three recent cases demonstrate a shift in the courts' approaches to federalism disputes—moving from bright-line rules and blanket preemption toward more concurrent jurisdiction.[7]

Most importantly, Professor Rossi chastises the courts for adopting and maintaining such crude approaches to jurisdictional disputes.[8] Consistent with the long-standing rules-versus-standards debate, Professor Rossi argues that the original purposes of these New Deal statutes, combined with the complexities of the modern energy markets, argue for a move towards case-by-case analysis.[9] He argues that the courts approach these debates with too broad of a brush, beginning their analysis by thinking of every single practice or activity as one side or the other of an ex ante dividing line.[10] This inevitably sweeps in or out too many modern energy transactions whose jurisdiction should be decided with a more thoughtful analysis of their purpose and effect. Professor Rossi's greatest contribution is his plea for courts to "be more attentive to the core purposes behind energy statutes as they address modern market disputes," abandon field preemption, and let avoidance of regulatory gaps trump concerns of regulatory overlap.[11]

In this response, I raise three additional pitfalls to augment Professor Rossi's focus on broad field preemption as one of the main obstacles on the way toward this brave new path.[12] First, I raise the difficulty of defining concurrent jurisdiction. By using concurrent jurisdiction, does Professor Rossi imply something different from the "cooperative federalism"

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3. *Id.* at 407–14.
4. *Id.* at 407–10.
5. *Id.* at 410–12.
6. *Id.*
7. *Id.* at 414–43.
8. *Id.* at 454–62.
9. *Id.* at 457–65.
10. *Id.* at 457–59.
11. *Id.* at 444–45.
12. Rossi rightly says that "statutes simply do not freeze in place existing constitutional doctrines as interpretive tools." *Id.* at 440. In fact, if anything, we view the Constitution as providing stable principles and statutes as adjusting themselves over time.

referenced by the Justices in these opinions? Professor Rossi persuasively argues that the Federal Power Act does not require a dual federalism approach,[13] but I think it is a larger intellectual jump to infer concurrent jurisdiction. Second, it appears that not all parts of energy law are to be subject to this new concurrent approach. If that is the case, where does it end, and who is to make the decision as to whether a given transaction falls within exclusive jurisdiction or concurrent jurisdiction? Third, how does a concurrent approach hold up when there is federal–state conflict? It is much easier to apply a concurrent approach when federal and state actions are of common purpose, but quite another to apply this approach in a workable manner when federal and state actors are at cross-purposes.

II. Defining and Inferring Concurrent Jurisdiction

Over 2,276 articles have been written about federalism, just in the legal arena.[14] Another 1,658 articles have been written in the social and political sciences.[15] The vast scholarship on "Our Federalism"[16] conveys the breadth and depth of different federal-state power allocations across the spectrum. As much as federalism has been analyzed, perhaps it is no surprise that scholars have coined a seemingly endless number of forms of federalism. Although some scholars have tried to group all of federalism into four major categories (centralized, devolved, dual, and interactive),[17] others have further bifurcated each category into many sub-categories. A quick search resulted in encounters with at least seventeen other types of federalism: "picket-fence" federalism,[18] "vectoral federalism,"[19] including horizontal[20] and vertical[21] federalism, "horizontal cooperative federalism,"[22] "upside down cooperative federalism,"[23] "normative federalism,"[24] "interactive federalism,"[25] "coercive federalism,"[26] "preemptive

13. *Id.* at 438–53.

14. Westlaw search for "TI(federalism)" in "Secondary Sources" database. Search performed Sept. 28, 2016.

15. Jstor search for "TI(federalism)." Search performed Sept. 30, 2016.

16. Heather K. Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1549, 1550–51 (2012).

17. Benjamin K. Sovacool, *The Best of Both Worlds: Environmental Federalism and the Need for Federal Action on Renewable Energy and Climate Change*, 27 STAN. ENVTL. L.J. 397, 417–52 (2008).

18. Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1554 (1994).

19. Scott Dodson, *Vectoral Federalism*, 20 GA. ST. U. L. REV. 393, 398 (2003).

20. Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493, 498–504 (2008).

21. *Id.*

22. JOSEPH F. ZIMMERMAN, INTERSTATE WATER COMPACTS: INTERGOVERNMENTAL EFFORTS TO MANAGE AMERICA'S WATER RESOURCES 5 (2012).

23. Vivian E. Thomson & Vicki Arroyo, *Upside-Down Cooperative Federalism: Climate Change Policymaking and the States*, 29 VA. ENVTL. L.J. 1, 3–4 (2011).

24. Dodson, *supra* note 19, at 399.

25. Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243,

federalism,"[27] "process federalism,"[28] "dynamic federalism,"[29] "polyphonic federalism,"[30] "empowerment federalism,"[31] "executive federalism,"[32] "opt-in federalism,"[33] "rhetorical federalism,"[34] and administrative federalism,[35] not to mention all the topic-specific explorations into federalism.[36]

With so many analytical approaches to choose from, why does Professor Rossi infer concurrent jurisdiction? Is it a subset of one of these forms of federalism? Or does it subsume a number of these other classifications? He indicates that "[r]ecognition of statutory authorization for concurrent jurisdiction . . . opens up possibilities for new energy federalism arrangements such as dynamic federalism and cooperative federalism."[37] The most traditional forms of concurrent jurisdiction include cooperative federalism (which is often dictated by statute, as in the Clean Air Act and the Clean Water Act),[38] concurrent enforcement by both state and local authorities (which is often dictated by statute, as in RICO),[39] or concurrent enforcement by two federal or two states agencies (which is often dictated by statute, as in EPA-NHTSA Joint Rule).[40] Congress usually provides for the express allocation of concurrent power, and so it is unclear why Professor Rossi reads concurrent jurisdiction into these eighty-

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250–52 (2005).

26. Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 704 (2001).

27. Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692, 1693 (2001).

28. Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1358–59 (2001).

29. Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159, 176–77 (2006).

30. Schapiro, *supra* note 25, at 252 (seeking to harness the interaction of state and national power to advance the goals associated with federalism).

31. *Id.* at 248.

32. Jessica Bulman-Pozen, *Executive Federalism Comes to America*, 102 VA. L. REV. 953, 954 (2016) (explaining "processes of intergovernmental negotiation that are dominated by the executives of the different governments within the federal system").

33. Brendan S. Maher, *The Benefits of Opt-In Federalism*, 52 B.C. L. REV. 1733, 1779 (2011).

34. Elizabeth Weeks Leonard, *Rhetorical Federalism: The Value of State-Based Dissent to Federal Health Reform*, 39 HOFSTRA L. REV. 111, 112–13 (2010).

35. *See generally* Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2029 (2008) (promoting the idea that federal agencies are actually in the best position to effectuate and protect state interests).

36. *See*, *e.g.*, David S. Rubenstein, *Black-Box Immigration Federalism*, 114 MICH. L. REV. 983 (2016). Other topic-specific examples include privacy, human rights, etc.

37. Rossi, *supra* note 1, at 403–06, 403.

38. 42 U.S.C. § 7402 (2012); 33 U.S.C. § 1253 (2012).

39. Tafflin v. Levitt, 493 U.S. 455, 458 (1990).

40. Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1169 (2012).

year-old statutes. He justifies it, in part on avoiding a regulatory "no man's land,"[41] but it may need more justification, particularly if the gaps could be filled through other analytical frameworks.

Even more importantly, what does Professor Rossi really mean by concurrent jurisdiction? Although Professor Rossi does recognize the Supreme Court's references to cooperative federalism[42] and his prior work has suggested that cooperative federalism is consistent with the FPA,[43] it does not appear that cooperative federalism fully explains what he means by concurrent jurisdiction.[44] In its most traditional form, Congress developed cooperative federalism structures within a statute to reflect a compromise between complete state and federal control.[45] Congress usually charges the federal actors with establishing standards and charges the state actors with implementing them. While more recent scholars have argued that states retain significant power from within this relationship,[46] others view these programs as "coercive"[47] or "uncooperative"[48] federalism, arguing the states' lack of true choice in these relationships.[49]

Alternatively, some may view concurrent jurisdiction where federal and state actors both have the right to exercise "all of the same authority."[50] Some view concurrent jurisdiction as referring to state and federal courts sharing jurisdiction.[51] Neither of these seems to be the type of concurrent jurisdiction that Professor Rossi envisions. So what would concurrent

41. Rossi, *supra* note 1, at 449.

42. Rossi, *supra* note 1, at 453 n.350.

43. Rossi, *supra* note 1, at 403 n.21.

44. Rossi, *supra* note 1, at 403–06, 452–53.

45. *See*, *e.g.*, 42 U.S.C. §§ 7401–7671q (2012); 33 U.S.C. §§ 1251–1388 (2012); 30 U.S.C. §§ 1201–1328 (2012); 16 U.S.C. §§ 2601–2645 (2012).

46. Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1258–59 (2009).

47. Rena I. Steinzor, *Unfunded Environmental Mandates and the "New (New) Federalism": Devolution, Revolution, or Reform?*, 81 MINN. L. REV. 97, 225–26 (1996).

48. Bulman-Pozen & Gerken, *supra* note 46, at 1258–60.

49. *See*, *e.g.*, Shanty Town Assocs. Ltd. P'ship v. EPA, 843 F.2d 782, 792 (4th Cir. 1988) (noting that the states "serve merely as agents for the implementation of federal water pollution control policy; it is the federal government, not the individual states, that shapes and directs the regulatory policy").

50. Prof'l Helicopter Pilots Ass'n, Office & Prof'l Emps. Int'l Union, Local 102 v. Lear Siegler Servs., Inc., 326 F. Supp. 2d 1305, 1310 (M.D. Ala. 2004), *aff'd sub nom*. Prof'l Helicopter Pilots Ass'n v. Lear Siegler Servs., Inc., 153 F. App'x 630 (11th Cir. 2005). "Concurrent legislative jurisdiction exists 'in those circumstances wherein, in granting to the United States authority which would otherwise amount to exclusive legislative jurisdiction over an area, the State concerned has reserved to itself the right to exercise, concurrently with the United States, all of the same authority.'" *Id.* (quoting U.S. DEP'T OF ARMY REGULATION 405–20, REAL ESTATE: FEDERAL LEGISLATIVE JURISDICTION (1973)).

51. *See*, *e.g.*, Luther v. Countrywide Fin. Corp., 125 Cal. Rptr. 3d 716, 719–21 (Cal. App. 2 Dist. 2011) (holding that state courts have concurrent jurisdiction over federal securities law suits that do not involve a "covered security").

federalism entail? If not equal authority and not a master–servant relationship, then how are stakeholders to understand this new analytical approach and its limitations? For instance, Professor Rossi suggests that demand response reflects a concurrent approach because both state and federal actors can regulate different aspects of demand response.[52] But the federal and state actors do not actually possess the same authority. Both regulators do not have jurisdiction over aggregated demand response, and both regulators do not have jurisdiction over compensation in wholesale markets. If we dig down to a granular enough level, there is still a division in authority that more closely resembles bright lines.

Is my concern merely one of semantics? In reality, does concurrent federalism encompass many of these other flavors of federalism? I raise it as a potential obstacle because stakeholders may bring their preconceived notions of "concurrent federalism" to energy disputes, and it may look different to different entities. As just one alternative conception of overlapping jurisdiction,

Professor Robert Schapiro has characterized the Rehnquist Court's federalism approach as "dualist," in contrast to the former "dual" conception. The three-letter difference captures this distinction: whereas dual federalism drew lines between impermeable domains of federal and state authority, "dualist" federalism recognizes some measure of overlapping authority. Instead of policing the edges of those spheres, dualism seeks to protect the core of plenary control entrusted to each sovereign. Overlap might be tolerated at the periphery, but in these core areas, the idea of one-and-only-one sovereign remains. The ultimate touchstone for this regime is the distinction between what is "truly national" and "truly local." If an area is neither, then non-exclusive jurisdiction is permitted. If an area falls within the protected core, it is invalid notwithstanding a host of pragmatic benefits.[53]

Perhaps the most appropriate way to conceptualize the concurrent jurisdiction is with Professor Rossi's characterization of state and federal regulators operating "adjacent programs that touch on the same regulatory topics."[54]

III. When Should Courts Infer Concurrent Jurisdiction?

Just to make matters more complicated, Professor Rossi does not appear to argue that all of energy law be approached from a concurrent

52. Rossi, *supra* note 1, at 436–39.

53. Christopher K. Bader, *A Dynamic Defense of Cooperative Federalism*, 35 WHITTIER L. REV. 161, 167 (2014). Note additionally that this may seem to cut against Professor Rossi's pragmatic approach.

54. Rossi, *supra* note 1, at 452.

jurisdiction perspective. Instead, Professor Rossi appears to urge concurrent jurisdiction over market-related aspects of energy law[55] but allow exclusive jurisdiction to remain over other areas.[56] Professor Rossi argues that it is counterproductive to the purposes of the Federal Power Act to articulate an ex ante divide for all regulatory actions of a certain form (as field preemption attempts) unless it is impossible for some specific state regulatory decision to coexist with Congress' delegation of authority to the Federal Energy Regulatory Commission (FERC).[57] This suggests that under Professor Rossi's theory of concurrent jurisdiction some areas of energy law, like the siting of generation, remain under the exclusive jurisdiction of the state actors.[58] Similarly, it is clear that federal regulators have jurisdiction over wholesale sales of energy and state regulators cannot adopt approaches that conflict with or present an obstacle to this.

If it is correct that some exclusive jurisdiction is to remain, how and who is to decide where exclusive jurisdiction ends and concurrent jurisdiction begins? *ONEOK, Inc. v. Learjet, Inc.*,[59] for instance, suggests that states can regulate in ways that impact wholesale rates, just as federal actors can regulate in ways that impact retail rates.[60] Where a state action is challenged as exceeding its authority, the courts may question the target of the state regulation.[61] Where a federal action is challenged as exceeding its authority, the courts may question whether the practices directly affect wholesale rates.[62] Is the asymmetry reflected in these two approaches a function of the entity that is being challenged? And are the courts the proper entity to mediate these disputes?

Regardless of who decides, a related question is how far should the concurrent approach extend beyond modern electricity markets? Should this approach encompass energy storage, for instance? Should there be a blanket agreement that siting jurisdictional controversies are off limits to a concurrent approach? It is the delicate intersection between retail and

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55. *See, e.g.*, *id.* at 403 (explaining "where neither federal nor state regulators can effectively address problems in energy *markets*"); *id.* at 406 ("reveal the folly of field-preemption approaches for modern energy *markets*"); *id.* at 407 ("courts recognize that dual sovereignty no longer serves as the primary organizing paradigm for all energy transactions closely tied to the wholesale *market*") (emphases added).

56. *See, e.g.*, *id.* at 407 (noting "the Supreme Court has narrowly interpreted any authority reserved exclusively to states").

57. *Id.* at 439–43.

58. *Id.* at 440 n.278 (reporting "[T]he only activities reserved *exclusively* for states under the [Federal Power Act] are the facilities listed in the last sentence of section 201(b) . . . .") (emphasis in original).

59. 135 S. Ct. 1591 (2015).

60. *Id.* at 1602–03.

61. ONEOK, Inc. v. Learjet, Inc., 135 S. Ct. 1591, 1599–1600 (2015).

62. FERC v. Elec. Power Supply Ass'n, 136 S. Ct. 760, 772–73 (2016).

wholesale rates that is probably most suited to a concurrent jurisdiction analysis, but that leaves many open issues as to its appropriate implementation.

IV. How to Resolve Concurrent Jurisdiction during Conflict?

A last dilemma anticipates the complications surrounding federal and state actors that disagree. The concept of concurrent jurisdiction may work where both federal and state actors are trying different means to achieve the same ends. But what is to happen when state and federal actors are at cross-purposes? As with cooperative federalism, where states have been known to drag their feet, fail to respond to statutory requirements, and sometimes act in downright defiance, it would be naive to assume that states would always act in concert with the policy of the federal government. Perhaps Professor Rossi anticipates this, and that is when he uses the term "concurrent jurisdiction" as opposed to cooperative jurisdiction.[63]

Whereas overly broad federal preemption of state initiatives can render collaboration difficult,[64] Professor Rossi appears more hopeful that concurrent federalism can enable "innovative approaches to collaboration between federal and state regulators."[65] But such collaboration also stands a greater chance of success where state and federal actors are pursuing a common purpose. Alternatively, when the federal and state regulatory approaches conflict, the courts may find themselves back in the same regulatory predicament—needing to determine whether state or federal regulation trumps.

According to Professor Rossi's approach, such determinations may be "pragmatic choices . . . delegated to the FERC."[66] Although he advocates for the elimination of judicially grafted field preemption in favor a case-by-case basis,[67] if anyone is to draw bright lines, Professor Rossi relies on agency preemption theories to delegate decision-making to FERC.[68] Unfortunately, eliminating the bright lines may embolden both federal and state actors to regulate those areas they deem necessary, making it harder for FERC to be the final arbiter of disputes. The problem lies not in courts moving before FERC makes its decision,[69] but in courts overruling a FERC determination. Surely this will not minimize litigation surrounding

63. Acknowledging, however, that there are many who view cooperative federalism as "uncooperative," but perhaps in a different way than is envisioned if states and federal actors are working towards different purposes. Rossi, *supra* note 1, at 403.

64. *Id.* at 452.

65. *Id.* at 451.

66. *Id.* at 454.

67. Rossi, *supra* note 1, at 459–65.

68. *Id.* at 464–65.

69. *Id.* at 463.

federalism, but it may alter the approach and the focus of future litigation. And if FERC is to be the arbiter, doesn't that suggest that the powers are not concurrent in a sense of equal authority, but that state powers are subservient to federal prerogatives?[70]

This would suggest that an approach that begins with concurrent jurisdiction may have limited longevity. As others have questioned with respect to President Obama's approach to federalism, "[s]tates are given significant room to shape their participation in the new federal initiatives" but may only be provided such flexibility "in service of progressive policy, not a general devolution of power and resources to the states."[71] I query whether this concurrent jurisdiction would be of the same ilk. States will be allowed to regulate concurrently so long as they are in concert with federal initiatives. But where states begin to diverge, FERC may revert back to prior approaches that provide it with a trump card to exercise previously dormant powers or broaden its existing authority.[72]

V. Conclusion

As others have articulated, "[b]y giving the federal government only those powers it needed to solve problems no one state could deal with alone, the Constitution ensured that the states would retain primacy as regulators of the American people."[73] If we used this test to interpret statutes that divided power between states and federal actors, we might interpret the energy statutes to only provide FERC with powers it needs to solve problems that no one state could deal with alone. Professor Barron has articulated the need to "acknowledge[] the more complicated

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70. This sounds much more like traditional cooperative federalism programs, in which federal actors can trump state failures to comply with federal standards through a claw-back provision. But perhaps the Justices wanted to see a more equal relationship in energy. *See* FERC v. Elec. Power Supply Ass'n, 136 S. Ct. 760, 779–780 (2016) (noting the ability of states to effectively veto the ability of the federal government to regulate demand response proved important to the Justices, suggesting that courts may be more likely to apply a concurrent framework where there is an allowance for state actors); *see also* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 106–19(1970) (explaining that the right to exit a program increases the efficacy of one's voice in affecting change, if enhanced by a credible threat to exit).

71. Gillian E. Metzger, *Federalism Under Obama*, 53 WM. & MARY L. REV. 567, 569–70 (2011).

72. Rossi, *supra* note 1, at 452–54. Where the state and federal actors are at cross-purposes, there is also the opportunity for a unique form of forum shopping. Regulated entities may be able to choose which jurisdictional authority they wish to trigger (e.g., by aggregating DR to trigger state jurisdiction or to contract out to a third-party DR aggregator for sale in wholesale markets to trigger federal jurisdiction), attendant with all the traditional problems associated with forum shopping. *See generally* Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481 (2011).

73. Bader, *supra* note 51, at 166 (footnote omitted).

relationship between local autonomy and central power,"[74] and Professor Shapiro has noted, "[t]he key problem for federalism is not separating state from federal power, but managing the overlap of state and federal law."[75] There are still pitfalls in the path forward, but Professor Rossi is to be commended for moving the needle in this evolving quest to acknowledge and explore a more effective analytical approach to navigate the complicated relationship between federal and state authority over energy.

74. David J. Barron, *A Localist Critique of the New Federalism*, 51 DUKE L.J. 377, 381 (2001).

75. Robert A. Schapiro, *Monophonic Preemption*, 102 NW. U. L. REV. 811, 812 (2008).